

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JAMES H. STERN

PETITIONER

VS.

CIVIL ACTION NO. 3:07cv348-DPJ-JCS

MALCOLM McMILLIN

RESPONDENT

ORDER

This case is before the Court on Petitioner's objection to the Report and Recommendation of the United States Magistrate Judge, which was entered in this cause on March 5, 2008. The Magistrate Judge determined that Petitioner's claim should be dismissed as frivolous and for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). After reviewing the findings in the Report and Recommendation, together with Petitioner's objections, and being otherwise duly advised in the premises, the Court finds that, based on the applicable standard, the Report and Recommendation should be adopted in part and rejected in part, as provided below. The Court also finds that Petitioner's Motion for Preliminary Injunction and Request for Transportation [34] is not well taken and should be denied. Additionally, Petitioner's Motion for Emergency Injunction and Motion to Compel Execution of Judgment [44] and Motion for Hearings [64] are also denied.

The Magistrate Judge dismissed the petition as frivolous and for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). "A complaint is frivolous 'if it lacks an arguable basis in fact or law.'" *Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999) (quoting *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir.1998)). The standard for dismissal for failure to state a claim is governed by the same standard as a dismissal under 12(b)(6) of the Federal Rules of Civil Procedure. *Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002). As such, a complaint fails to state a

claim when it does not contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007).

Applying these standards, the Court finds that many of Petitioner’s allegations are frivolous and due to be dismissed. However, the Court declines the recommendation to dismiss Petitioner’s claims with respect to the barbering practices and policies of HCDC. Although these claims may not survive a later summary judgment motion, Petitioner has alleged sufficient facts to survive 12(b)(6) review. The Court adopts the remainder of the Report and Recommendation and dismisses Petitioner’s other claims, including allegations of genocide and attempted murder.

Finally, the Court adopts the recommendation to dismiss Petitioner’s access to the courts claim for the additional reason that Petitioner has successfully prepared and filed more than twenty motions in this action. *C.f., Spencer v. Bruce*, 214 F. App’x 392, 393 (5th Cir. 2007) (citing *Brewer v. Wilkinson*, 3 F.3d 816, 821 (5th Cir. 1993)).

IT IS, THEREFORE, ORDERED that the Report and Recommendation of United States Magistrate Judge James C. Sumner is adopted in part and rejected in part as provided by this order. Furthermore, Petitioner’s Motion for Preliminary Injunction [34], Motion for Emergency Injunction and to Compel Execution of Judgment [44] and Motion for Hearings [64] are denied.

This action is remanded to Magistrate Judge James C. Sumner for proceedings consistent with this order.

SO ORDERED AND ADJUDGED this the 17th day of September, 2008.

s/ Daniel P. Jordan III
UNITED STATES DISTRICT JUDGE

